

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

DR DISTRIBUTORS, LLC,) Docket No. 12 C 50324
)
Plaintiff-Counterdefendant,) Rockford, Illinois
) Tuesday, April 17, 2018
v.) 10:00 o'clock a.m.
)
21 CENTURY SMOKING, INC.)
and BRENT DUKE,)
)
Defendants-Counterplaintiffs,)
)
CB DISTRIBUTORS, INC. and)
CARLOS BENGUA,)
)
Counterdefendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE IAIN D. JOHNSTON

APPEARANCES:

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MR. ANTHONY J. DAVIS

ROBERT C. von OHLEN & ASSOCIATES
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1 THE CLERK: Calling 12 CV 50324, DR Distributors, LLC
2 vs. 21 Century Smoking, Inc.

3 MR. STAMATIS: Good morning, your Honor.

4 THE COURT: Good morning, Mr. Stamatis.

5 MR. von OHLEN: Good morning, your Honor.

6 THE COURT: Let's get appearances, please.

7 MR. von OHLEN: Robert von Ohlen and Anthony Davis
8 for the Plaintiffs.

9 THE COURT: Good morning, Mr. Von Ohlen. Good
10 morning, Mr. Davis.

11 MR. STAMATIS: Peter Stamatis for 21.

12 MR. LEAVENS: Good morning, your Honor. Thomas
13 Leavens on behalf of 21 and Brent Duke.

14 THE COURT: Good morning, Mr. Leavens. Good morning,
15 Mr. Stamatis.

16 I will try to do, in theory, the easy one first,
17 maybe.

18 On the sealing of the documents, who thinks the
19 documents are confidential and need to be sealed? And tell me
20 why. They have been on the record for like weeks now, right?

21 MR. STAMATIS: Yes, your Honor. The protective order
22 had been in place, and these were documents that had been
23 marked, and when we saw that we reached out to counsel. We
24 advised him that we thought they ought to remain confidential
25 or at a minimum have gone through the process that was set

1 forth in your Honor's protective order, which reached out to
2 us for us to make that determination.

3 From our perspective, we would like to keep the
4 documents confidential, if for no other reason that they do
5 contain customer information, addresses and that type of
6 information, and there is also a tax return that was included
7 in there that was marked. All these had been marked
8 confidential.

9 THE COURT: Okay.

10 MR. STAMATIS: We are happy to put together, in short
11 order, our position in writing to your Honor with this, as we
12 are to the other motions before the court today.

13 THE COURT: Okay. How much time do you need?
14 Because it is kind of a little awkward. If it is confidential
15 for you, but they are saying, "Seal them, prove your point
16 that they are confidential," it is just a little bit kind of
17 backwards.

18 MR. von OHLEN: We don't want to win our motion,
19 Judge.

20 THE COURT: Okay. All right.

21 MR. DAVIS: And for housekeeping, your Honor, the
22 motion that we filed to provisionally seal last night, Docket
23 244 and 245, should probably just -- we have it, I think, on
24 for next Thursday for presentment.

25 THE COURT: No, I was here at 8:00 o'clock last

1 night, but I didn't read your guys motion, okay?

2 MR. DAVIS: The sum and substance is the same.

3 THE COURT: Is the same, okay.

4 MR. DAVIS: We have attached and provisionally sealed
5 these, and it would be the same issue for Defendants to do
6 just as we did before. I think it was in February or March.
7 We went item by item through each exhibit, and the burden was
8 on the party wanting to protect it, you know, following
9 Baxter. That's how we proceeded before.

10 THE COURT: Okay. Well, I said this was going to be
11 the easy one, and now I'm kicking myself.

12 What kind of time frame, Mr. Stamatis, Mr. Leavens,
13 would you be looking at to get something on file relating to
14 keeping these types of documents under seal?

15 MR. STAMATIS: 14 days, your Honor.

16 THE COURT: And I said I was kicking myself because
17 on the other motion, we had cross-motions for summary
18 judgment, obviously not fully briefed. So it is just kind of
19 in the holding pattern over with Judge Kapala.

20 I guess I'm going to state the obvious: You guys
21 want to win your motion, right?

22 MR. DAVIS: Yes, your Honor.

23 MR. von OHLEN: Yes, we do want to win this one.

24 THE COURT: And you guys want to win your motion,
25 right?

1 MR. STAMATIS: That's right.

2 THE COURT: Okay. For the detached, neutral reader
3 of both motions, meaning Judge Kapala, if both sides want to
4 win their motions, one of the first rules of writing -- well,
5 the first rule of writing is good writing is rewriting, the
6 second is know your audience, and the third is make it easy on
7 the reader. From my outside perspective, I'm thinking right
8 now Judge Kapala has a mess on his hands, and the last thing I
9 want him to do is look at the mess and throw up his hands and
10 say, "Re-file," and then we restart the whole process.

11 We have got the issue relating to the documents that
12 were provided -- yes -- provided recently. Just throwing this
13 out there: Does it make sense, because you are not going to
14 lose your place in queue because you have already started the
15 briefing schedule, so that you don't have the situation of
16 Judge Kapala saying, "This is a mess; I can't make heads or
17 tails of this; I have got cross-motions; I have got motions on
18 statements of fact; I have got motions to strike; I have got
19 these statements of fact that have these issues; I have got
20 all this in front of me," to avoid him just throwing up his
21 hands and telling you to redo it, do you want to restart now
22 and file a nice, clean set so that the reader knows what he
23 has in front of him?

24 You are not going to lose your place in queue.

25 MR. von OHLEN: Well, we are already -- as of today,

1 we are fully briefed, except for our request before the court
2 to supplement on the, you know, literally eleventh-hour
3 production of documents.

4 THE COURT: But you want to file an amended document,
5 right?

6 MR. von OHLEN: I think what we want is a supplement,
7 Judge, to address only wherever these documents lead us.

8 THE COURT: So you don't want to go back and amend
9 what you previously filed?

10 MR. von OHLEN: No, it is supplement.

11 THE COURT: Okay. All right. So that's a helpful
12 clarification.

13 All right. The documents -- I saw Mr. Stamatis's
14 e-mail. It was attached as an exhibit somewhere, and I will
15 find it. But I think the quote was, "These aren't relevant,
16 but here they are anyway." Were they cited in any way in any
17 of the briefings, those documents that were provided?

18 MR. STAMATIS: Are we back to the documents that we
19 contend should have been filed under seal?

20 THE COURT: No, we have moved beyond that. We are
21 talking about there is a motion regarding --

22 MR. STAMATIS: Oh, yes, the motion to amend. Okay.

23 THE COURT: Right. It is not really amending the
24 filings now. It is a motion to get a supplement.

25 MR. STAMATIS: Okay.

1 THE COURT: And it is based upon the argument that
2 you folks at the eleventh hour provided them with documents.
3 All the dates had run, certainly the supplement date had run,
4 and so now they want to file an additional filing addressing
5 those documents or issues relating to those documents. Your
6 e-mail when they were produced said, "They are not relevant."
7 Is that accurate that you said they are not relevant? I can
8 find the e-mail somewhere.

9 MR. STAMATIS: Yes, that's generally -- that's our
10 position with regard to the documents. I can shed a little
11 light.

12 THE COURT: Yes. So my question to you was: Did you
13 cite those documents? Were you relying upon those documents
14 in any way on your -- in your filings?

15 MR. STAMATIS: No, your Honor.

16 THE COURT: Okay.

17 MR. STAMATIS: And what had happened was in the
18 Plaintiff's motion they had made an issue that there were
19 certain papers that hadn't been produced and that that somehow
20 evidenced some kind of unclean hands or something like that.

21 So we went back to our client and we so advised him,
22 and he went and took another look and said, "Here." One I
23 think was, perhaps, a copying error. The other documents that
24 were produced were documents that he found, and once we
25 received them we tendered them. It is nothing we have relied

1 upon, nor would we.

2 THE COURT: But were they requested? Did they fall
3 within a discovery request?

4 MR. STAMATIS: I would say they probably did, your
5 Honor.

6 THE COURT: Okay.

7 MR. STAMATIS: They were documents that existed I
8 think prior to the Plaintiff's adoption of our mark, but
9 documents that the client only found when we asked him to go
10 back and take another look.

11 THE COURT: I appreciate that. That is helpful
12 information.

13 It is your motion. I will hear from you. And then I
14 will hear from Mr. Stamatis and Mr. Leavens.

15 So, Mr. Davis, go ahead.

16 MR. DAVIS: Thank you, your Honor.

17 Just one point of clarification: The records that
18 were produced on the evening of March 19th are referenced and
19 referred to in their briefing, and that's part of the issue
20 here.

21 So as we are e-filing our final opposition brief on
22 the night of the 19th at 8:30 p.m., we get the e-mail from
23 counsel, the one you are referencing, which is Exhibit A to
24 our motion, and it says, "Within the last 48 hours, we
25 received these documents," from their client, and they are

1 related to our argument about missing documents. They say,
2 "We don't believe they are relevant to any other claim, but
3 here they are." And then two hours later, they filed their
4 briefing and referenced those documents in their briefing in
5 particular.

6 So we are here because of this issue that essentially
7 48 hours -- they had the documents for 48 hours. Without
8 explanation, they deliver them to us literally moments before
9 we are all required to file our final briefs, and this is a
10 tactical decision if they are holding them for 48 hours. Put
11 aside for a moment that they have had these records for years.
12 Discovery closed over a year and a half before. But they just
13 withheld the documents. They incorporate them into their
14 briefing, and then -- what it really raises for us is the
15 production of these e-mails about the key issue in the case.

16 These are e-mails that we sought at least three
17 different ways. They had three opportunities to produce these
18 in the case, which I will go over briefly with your Honor, but
19 these e-mails are with their outside SEO consultant, and as
20 you may recall, one of the key allegations in the case is that
21 our federally registered trademark was in their hidden
22 metadata in their website, and Judge Kapala in ruling on the
23 prior motion for summary judgment they had filed stated in
24 that ruling that if the jury found that to be -- or a jury
25 could find that's a basis for the unclean hands --

1 THE COURT: Right.

2 MR. DAVIS: -- and denying them all relief in this
3 case. So it is a critical issue in this case.

4 But it raises the issue, on that night we got these
5 documents, sort of unbelievably, a hundred pages of e-mails,
6 communications with this outside company we sought many times
7 during discovery, where are they from, how were they found,
8 who did it, why were they not part of the original e-discovery
9 protocol. Every e-mail in here has words and terms, the ones
10 they produced, that were part of our e-discovery protocol,
11 "Kirti Saraswat, Webrecsol." They were right in the list,
12 "Search these terms." We all met and conferred years ago.
13 "Pull all your e-data."

14 No one ever said data was missing, but we learn now
15 in this, their last filing, that Brent Duke, the owner of the
16 Defendant company, says, "Oh, I actually lost data. I didn't
17 preserve it. In 2014, things were being deleted, and I
18 learned of it then, and I stopped it." But for two years he
19 had an obligation to preserve data in this case and never once
20 disclosed that.

21 THE COURT: I'm going to pause you right there for a
22 second.

23 I have got to imagine there were multiple litigation
24 hold letters, right? There was a flurry of litigation hold
25 letters?

1 MR. DAVIS: Oh, right. That's what you are supposed
2 to do.

3 THE COURT: Was data lost?

4 MR. STAMATIS: Not to our knowledge, your Honor.

5 THE COURT: Okay.

6 MR. LEAVENS: I think there was something in place
7 that -- and we have to confirm this with the client -- that it
8 wasn't any data that was being destroyed by our client, but
9 there was some data that was held by another service that has
10 as a regular protocol the deletion of information that --

11 THE COURT: So a third-party contractor had your
12 client's data; is that right?

13 MR. LEAVENS: I probably even shouldn't be speaking,
14 your Honor. I just understand that there was something that
15 occurred along those lines. We are going to have to get some
16 detail on it. I can't speak to what that is.

17 THE COURT: You will have to get a lot of detail
18 because if there is a third-party vendor that has your
19 client's data and a litigation hold letter was sent -- I
20 assume one was sent -- if there was one sent, and a
21 third-party contractor of a party deletes data, loses data,
22 spoils data, whatever verb you want to put on it, that goes to
23 the client, okay?

24 MR. STAMATIS: May I suggest something, your Honor?

25 We would like to have the opportunity to respond to

1 the motion to strike and the motion for leave to amend -- I
2 think these are the two motions that encompass these
3 issues -- in writing so we can present it to your court, to
4 your Honor in writing, in a cogent manner, whether that is two
5 responses or one combined response that deals with it all, so
6 we could lay out the timing of all this and your Honor could
7 have it in front of you.

8 THE COURT: Okay. I'm trying to get a 2012 case
9 resolved. Now that that other case, the Alacran case, is
10 almost dead, you are going to be next on the oldest case in
11 the building. So I'm going to come back to that. But I
12 interrupted Mr. Davis in the middle of an argument.

13 Go ahead. I'm taking the pause button off you.

14 MR. DAVIS: Thank you, your Honor.

15 During the course of the discovery, not only would
16 these e-mails with the search terms have been responsive to
17 the search terms, no one ever told us data was lost at that
18 time. They were the subject of specific document demands, to
19 which objections were asserted, a Bates range of documents
20 were recited to which is completely not related to any
21 e-mails, followed up with a written meet-and-confer, "Where
22 are these records?" None were produced.

23 At the deposition of Brent Duke, we asked him, "Did
24 you have e-mail communications with the person, the SEO
25 company?" It is called "Webrecsol." The person's name is

1 Kirti Saraswat. And he said --

2 THE COURT: You are going to have to provide
3 Ms. Perkins-Reiva with the spellings.

4 MR. DAVIS: Yes, I will.

5 But we asked about it because Mr. Duke produced a
6 picture of his Outlook e-mail folders, and one of them says
7 "Kirti" on it. So I remember that deposition very clearly,
8 asking him, "Did you have e-mails with this outside vendor?"
9 Because it is this critical piece of "Who put our trademark in
10 your website," right? How did it get there? The mystery
11 still continues, and these e-mails are part of that puzzle,
12 but I don't think it is a full production.

13 But we asked him about that that day, and he said, "I
14 did have e-mails with her.

15 "Well, where are they?

16 "Well, I don't delete them.

17 "Well, isn't that a folder from your own e-mail?

18 "Yes, but I don't know."

19 Nothing was ever produced. He said he e-mailed with
20 her. He said he had a folder.

21 In our original filing on the motion for summary
22 judgment, we said, "Given these facts, they are withheld." I
23 don't know what else to call it. When it is asked for, and
24 you say you have them, if you don't produce them, they are
25 withheld. That's part of our argument about the litigation

1 misconduct that goes to the unclean hands portion of our
2 defense in this case.

3 In the response to that, this is what we got on the
4 night of the 18th at 8:30 p.m.: "Here's these e-mails," no
5 explanation, and used in their briefing. They are cited in
6 there as part of their opposition they filed two hours later.

7 We have got to get to the bottom of this. A part of
8 this equation -- I think I have seen this before in cases.
9 Usually, the adversary says, "Sorry, let me explain what
10 happened. Let me give you a deposition at our cost. You
11 know, we will try to sort it out." I never had it this late
12 in the game, but this is a tactical decision, in my view, to
13 give them at that last minute. They say in their e-mail, "We
14 had them for 48 hours." They didn't give them to us. They
15 waited so we couldn't use them in any way, review them. We
16 might still be here, but I view that as a tactical decision.

17 More importantly is it goes to the critical issue in
18 this case, and while counsel may want to put something in
19 writing, we filed this over a week ago. We filed this ten
20 days ago.

21 MR. von OHLEN: Ten days ago.

22 MR. DAVIS: Nothing has been filed in response to it.
23 And usually on an issue like this, I want to swear someone in.
24 I want to get Brent Duke on record. I don't want a 16-page
25 explanation from the lawyers. If they are representing to

1 this court that Brent Duke just found these documents, I want
2 to know when did he learn he was losing data, who did he
3 communicate it, where are these records from. We want this
4 data. It goes to a core issue in this case. We don't need to
5 wait 14 days for a written response. Let's swear him in.
6 Let's take a dep. That's how you get to the bottom of it.

7 THE COURT: Okay. Mr. von Ohlen?

8 MR. von OHLEN: Yes, right. I know the court is
9 short on time. So I think what we want is a remedy to move
10 the case along. I don't think -- I mean, I didn't hear
11 anything. They don't even know where these things came from.
12 The only way you are going to get the truth is you swear
13 somebody in.

14 So, basically, what we would like is to represent to
15 the court a 30(b)(6) notice, who has the most information
16 regarding these documents, where they were, where they came
17 from, why they weren't produced. If that's Brent Duke, fine,
18 produce him. We will take his deposition very quickly. You
19 know, give us three weeks to do it, and we will file a
20 supplement or we won't. Maybe we will find out, "Hey, no
21 harm, no foul," like they represent, or maybe we will find out
22 there is something sinister going on. But the only way you
23 get to the bottom of that is you swear somebody in under the
24 penalty of perjury, not some, you know, filtered, ten-page
25 response to the court, and I think that's the resolution that

1 we seek.

2 THE COURT: How about if I just bar the documents,
3 they can't be used?

4 MR. von OHLEN: Well, I think the problem is that
5 they might be helpful to us if they are hiding, you know,
6 something or helpful --

7 THE COURT: The documents that you have now, do they
8 help or hurt you, the documents that were produced at "the
9 eleventh hour"? Do they help or hurt you?

10 MR. DAVIS: They help to show that the previously
11 nonexistent communications with the outside SEO consultant,
12 they don't reference or talk about how our trademark ended up
13 in their website. So if they are being barred, and there is a
14 negative inference that goes with that under Rule 37(e),
15 that's a good outcome for us. But to have come this far in
16 the litigation, to get this stuff at the last second -- we
17 have been looking for these communications because we want to
18 see an e-mail from Brent Duke and his SEO consultant in India
19 that says, "Here is the keywords we want to put in your
20 website.

21 "Okay. They look good. Make sure to add 21 Century
22 Smoking, this competitor's trademark."

23 I mean, here is the smoking gun, the proverbial
24 smoking gun.

25 But barring the records, it doesn't get to the issue

1 that we are talking about. But if it is under 37(e) for
2 failure to comply with the ESI obligations, and it goes a step
3 further and says not only they are barred, but the jury is
4 advised that those e-mails would have been unfavorable to
5 them, we would take that as a resolution.

6 THE COURT: Okay. First, take a look at -- oh,
7 geez -- Snider v. Danfoss. There we go. I'm having one of
8 those days. Snider v. Danfoss, it will tell you what you need
9 to know about my particular view of 37(e). You can go on the
10 Seventh Circuit Electronic Discovery Pilot Program website and
11 you can hear what I say about it, plus I have a handy-dandy
12 flow chart that tells you everything you need to know about
13 37(e) because that's what I will be looking at, because that's
14 what I have figured out.

15 MR. von OHLEN: What is that case again, Judge,
16 Snider v. --

17 THE COURT: Snider v. Danfoss.

18 And there is a flow chart floating around. It was on
19 the webinar. That's sort of an aside.

20 But I keep coming back to my concern. As much as we
21 talk about what magistrate judges do, the main thing is to
22 make the district judges' lives better.

23 So what I'm hearing is a whole blowup. Now, maybe
24 Mr. von Ohlen is right, and maybe it turns out there is
25 nothing, no big deal, no harm, no foul, and that's my quote

1 right out of Snider v. Danfoss, "No harm, no foul."

2 But you have got your briefing going on the motion
3 for summary judgment. We head down the 37(e) route and that
4 blows up. What happens with your cross-motions for summary
5 judgment and what is in front of Judge Kapala?

6 MR. von OHLEN: Well, right now, as we are standing
7 here, literally last night, we filed the answers --

8 THE COURT: Yes.

9 MR. von OHLEN: -- to their last facts, however you
10 want to characterize that.

11 THE COURT: I saw that.

12 MR. von OHLEN: There is no other filings that are
13 going to occur, and I think we had a status that was set in
14 the early summer, presumably for your Honor to say --

15 THE COURT: Yes.

16 MR. von OHLEN: -- we are ready to present this to
17 Judge Kapala for decision. So we are in mid-April. We have a
18 little bit of time between now and then. And presumably
19 nothing else is due, other than their response to the
20 confidential -- basically, following Baxter v. Abbott Labs.

21 Other than that, and I assume the court will just
22 decide on the papers on that, this is the only other issue
23 outstanding. So we have a little bit of time, meaning a few
24 months, and if you were to order the Defendants to produce
25 Brent Duke for a deposition, you know, relatively soon, we can

1 follow up, and, like I said, maybe we come back in six weeks
2 for a telephone status and say we don't need it or we do need
3 to have the ability to file a supplemental brief.

4 MR. STAMATIS: May I address the court, your Honor?

5 THE COURT: July 24th is when the next status is.

6 Go ahead, Mr. Stamatis.

7 MR. STAMATIS: Thank you, your Honor.

8 So I have heard some things from counsel: That we
9 withheld documents; we never withheld any documents. That we
10 made a tactical decision; we did not make a tactical decision.
11 This is a case, frankly, I think we ought to prevail on
12 summary judgment.

13 THE COURT: Can I pause you right there?

14 MR. STAMATIS: Sure.

15 THE COURT: Setting the tactical decision aside.

16 MR. STAMATIS: Yes, sir.

17 THE COURT: And that was one of my first questions,
18 were they requested in discovery, and the answer I got was
19 yes, and then I think you said, yes, they were requested and
20 they were responsive.

21 Were they produced? Obviously, they weren't produced
22 pursuant to the discovery request, and they certainly weren't
23 produced before the supplemental date, and they were just
24 produced now. And if they are responsive, I don't know what
25 other verb you put on that other than "withheld."

1 I mean, weren't they withheld?

2 MR. STAMATIS: They hadn't been located. He hadn't
3 found them. He just found them when we asked -- Mr. Duke just
4 found them when we asked him to go back and take a look. The
5 reason this came up was there was an allegation in their
6 motion that by not having these documents, these were the
7 smoking gun that they were looking for. There is no smoking
8 gun.

9 We said, "Mr. Duke, here is what they are saying."
10 He went. He came back and said, "Here, I found these
11 documents. Are these documents responsive?" These are
12 responsive. What they show is that this entire idea of "Oh,
13 there is a smoking gun; oh, there was all this bad conduct" is
14 a red herring. It is a road to nowhere. So that's what they
15 show.

16 Do they help us? No, they are not relevant to the
17 case. Do they help them? No, they hurt them because they
18 establish that there is no "there" there.

19 THE COURT: Let me pause you there.

20 They are telling me that you -- I specifically asked
21 you did you refer or rely upon or cite the documents in your
22 brief. You said no. They say yes.

23 MR. STAMATIS: They are correct in terms of us
24 responding and saying, "These are the documents. There is no
25 bad faith. There is no 'there' there." It is not -- what I

1 had meant to say was it is not an element or it is not a
2 document that we are going to use to prove our case.

3 THE COURT: Well, if they are moving on it, and then
4 you are --

5 MR. STAMATIS: Judge, in our affirmative case, your
6 Honor.

7 THE COURT: Well, they have an affirmative case, too,
8 and you are using it to rebut their affirmative case, right?

9 MR. STAMATIS: Well, in terms of them saying that the
10 failure to -- that these documents were not produced and they
11 are a smoking gun, and then Mr. Duke found them -- look, there
12 is no smoking gun. There is nothing there. So it takes off
13 the table this idea that there is some hidden smoking gun.

14 THE COURT: If the documents were responsive, and
15 there was an ESI protocol and there were search terms, and
16 these documents have the search terms in them and they were
17 not produced, that seems to be a problem, doesn't it?

18 MR. STAMATIS: And so this is something -- I don't
19 believe there is a problem. However, this is something that
20 predates my involvement in the case, my appearance in the
21 case. So I have to go back and figure it all out. I have to
22 go back and look, your Honor.

23 THE COURT: Okay.

24 MR. STAMATIS: With regard to protocols --

25 THE COURT: Why wouldn't there be a problem if there

1 is a document request, it captures ESI, we go through the
2 whole ESI protocol process, you go through the back-and-forth
3 and you develop your search terms, the search terms are
4 identified, everybody agrees on the search terms, the search
5 is done which should capture documents with the search terms,
6 that's the whole reason for the process, and you didn't do it?
7 That seems to -- that is causing me some concern.

8 MR. LEAVENS: I believe these documents, your Honor,
9 were at an account, an e-mail account, that was not something
10 that appeared on the hard drives that were searched.

11 THE COURT: Possession, custody, and control.

12 MR. LEAVENS: I'm sorry?

13 THE COURT: Possession, custody, or control, that's
14 Rule 34. Possession, custody, and control, that clearly means
15 contractors, and especially in the world of ESI, e-mails held
16 by third parties. I mean, that's like Black Letter Law stuff.
17 How much time do you need to get something on file?

18 Because it better be really good and supported by an
19 affidavit, and I will take a look at it. I don't want the ESI
20 tail wagging the summary judgment dog here, but this has to be
21 resolved because as much as I'm hearing, and maybe
22 optimistically, that it is not going to affect the summary
23 judgment, I see this thing blowing up, and then we jump down
24 the ESI rabbit hole, and it is going to be a problem, and
25 there will be sanctions motions and motions to exclude,

1 motions for adverse instructions. Whether you have an adverse
2 instruction on summary judgment, that seems kind of odd
3 because the district judge is reading it.

4 I'm giving you 14 days on the sealing order.

5 How much time do you need to respond to this motion
6 for leave to amend, which is technically a motion to file a
7 supplement?

8 MR. STAMATIS: 28 days, your Honor.

9 THE COURT: We have got to -- here is what we will
10 do: May 14th, get your response on file.

11 MR. STAMATIS: Thank you, your Honor.

12 THE COURT: We will have a status.

13 MR. von OHLEN: Would you like a reply, your Honor?

14 THE COURT: No, we are going to have a status right
15 after that. I'm going to give you time to take a look at the
16 response, and then we are going to figure out whether we are
17 going to have an evidentiary hearing on this issue.

18 So May 17th at 1:30 for a telephonic. Will that work
19 for the Plaintiff?

20 MR. DAVIS: Yes, your Honor.

21 MR. von OHLEN: Telephonic?

22 THE COURT: Telephonic.

23 MR. von OHLEN: Telephonic.

24 THE COURT: Does that work, Mr. Stamatis? Does that
25 work for you?

1 MR. STAMATIS: That's fine, your Honor.

2 THE COURT: Mr. Leavens, does that work for you?

3 MR. LEAVENS: Yes. Thank you.

4 THE COURT: May 17th, 1:30 for a telephonic. That
5 will give you a couple days to take a look at the response.
6 You can tell me --

7 MR. von OHLEN: When is it due again, your Honor,
8 what date, their brief?

9 THE COURT: May 14th.

10 MR. von OHLEN: May 14th.

11 And just as a housekeeping matter, for the motion
12 that we filed yesterday for seal, will the court take that off
13 calendar? Because it addresses the same issue of them
14 identifying --

15 THE COURT: What do you mean take it off calendar?

16 MR. von OHLEN: It was noticed for next Thursday.

17 THE COURT: We will strike it.

18 MR. von OHLEN: You will strike it?

19 THE COURT: Right, the presentment. Got you.

20 MR. von OHLEN: The presentment.

21 THE COURT: We have got it. They are going to file a
22 response in 14 days. We will figure out what we do with that.

23 And I would spent a lot of time talking to Mr. Duke
24 about what happened with the ESI. Maybe there is no "there"
25 there, but that's a problem currently, as it is currently

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1 framed --
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2 MR. STAMATIS: Okay.

3 THE COURT: -- production requests, document requests
4 responsive pursuant to an ESI protocol that are produced in
5 the middle of summary judgment briefing, long after the
6 supplement date, okay?

7 So we will talk on May 17th at 1:30. Provide
8 Ms. Pedroza with your contact information, and we will place
9 the call, okay?

10 MR. STAMATIS: Thank you, your Honor.

11 MR. von OHLEN: Thank you, your Honor.

12 (Which were all the proceedings heard.)

13 CERTIFICATE

14 I certify that the foregoing is a correct transcript from
15 the record of proceedings in the above-entitled matter.

16 /s/ Heather M. Perkins-Reiva May 11, 2018

17 _____
18 Heather M. Perkins-Reiva
19 Official Court Reporter

Date

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